THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0768, Appeal of New Generation Construction, LLC, the court on October 12, 2006, issued the following order:

The petitioner, New Generation Construction, LLC, appeals a decision of the New Hampshire Compensation Appeals Board (board) that awarded workers' compensation benefits to the respondent, Gary Weiner. We affirm.

We will uphold the board's decision unless there has been an error of law, or its findings or conclusions are shown, by a clear preponderance of the evidence, to be clearly unreasonable or unjust. Appeal of MacDonald, 152 N.H. 443, 445 (2005). In reviewing the decision, we are confined to the hearing record and will not substitute our judgment for the board's as to the weight of the evidence on questions of fact. Id.

The petitioner first argues that the board erroneously found that the respondent was an employee. The presumption that a person is an employee may be rebutted by proof that the individual meets all of the following criteria: (a) the person possesses or has applied for a federal employer identification number or social security number; (b) the person has control and discretion over the means and manner of performance of the work in achieving the result of the work; (c) the person has control over the time when the work is performed, and the time of performance is not dictated by the employer; (d) the person holds himself or herself out to be in business for himself or herself; and (e) the person is not required to work exclusively for the employer. RSA 281-A:2, VI (1999). The employer has the burden of production and persuasion on all five of these criteria. Appeal of Ann Miles Builder, 150 N.H. 315, 320 (2003). If the employer proves all five of the criteria by a preponderance of the evidence, then the presumption disappears and the employee retains the ultimate burden of proof. Id. If, however, the employer fails to prove all five of the criteria by a preponderance of the evidence, then the presumption remains and the board must find as a matter of law that the individual was an employee of the employer. Id. In this case, because there was no evidence that the respondent held himself out to be in business for himself, we conclude that the board did not err by finding that he was an employee. None of the evidence upon which the petitioner relies establishes that the respondent held himself out to be in business for himself.

The petitioner next asserts that the respondent failed to establish that any

work-related event occurred in October 2001, the alleged date of the injury to his left arm, and implies that the petitioner had to establish that a traumatic injury occurred on that date. The petitioner is mistaken. See Appeal of CNA Ins. Co., 148 N.H. 317, 320 (2002); see also RSA 281-A:16 (Supp. 2005).

The petitioner next contends that the respondent failed to prove medical causation. See Appeal of Savage, 144 N.H. 107, 110-11 (1999) (quotation omitted). The issue in this case is whether the respondent established medical causation for his 2001 left-arm strain. It is undisputed that there was both medical and legal causation for the 1999 injury to his right arm. At issue is the injury to his left arm.

The board found medical causation for the left-arm injury because of its relationship to the right-arm injury. The respondent argued, and the board agreed, that he overused his left arm at work because his right arm was injured. The overuse of his left arm led to the strain. In this way, the respondent asserted, his left-arm injury was legally and medically caused by work-related activities. Having reviewed the certified record and the transcript of the board proceedings, we conclude that there is evidence to support the board's determination that there was medical causation for the respondent's 2001 left-arm injury.

The petitioner argues that because the records "from Drs. Shelton and Radzicki contain no opinions about whether the cause of the alleged strain was work-related," the evidence does not support the board's finding of medical causation. We conclude that in the context of the overuse injury at issue, such an opinion was not required. In this case, it is undisputed that the respondent's right arm was injured in a work-related accident and there is evidence to support a finding that he relied upon his left arm because of that right-arm injury. Under these circumstances, we conclude that there was no need for a medical opinion that the left arm was overused because of work-related activities.

To the extent that the petitioner implies that the evidence was also insufficient to establish legal causation, we disagree. See Appeal of Bellisle, 144 N.H. 201, 204 (1999).

Finally, the petitioner asserts that there was insufficient medical evidence to establish that the respondent's left-arm injury was disabling. The petitioner contends that because the respondent continued to work until December 2001, he necessarily did not suffer a disabling injury as of October 2001. We have held that, in the workers' compensation context, the word "disability" means a loss of earning capacity. Appeal of Gagnon, 147 N.H. 366, 368 (2001). Thus, in order to receive indemnity benefits, the claimant must show a loss of earning capacity due to a work-related injury. Id. "The test used to determine entitlement to compensation is whether the claimant is now able to earn, in suitable work under normal employment conditions, as much as he or she earned at the time of the

injury." Id. (quotation omitted). Given this test, that the respondent continued to work until December 2001 does not mean that he did not suffer a loss of earning capacity due to his left-arm injury.

Affirmed.

BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.